B. Guarantee Clause.

The national commitment to representative democracy is not embodied only in the Constitution's structure, but in its text, perhaps most starkly in the national government's guarantee to every individual state of a republican form of government. Like the Guarantee Clause of the federal Constitution, *see* U.S. Const. art. IV, § 4, the Texas Constitution commits the state to republicanism.

> All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient.

Tex. Const. art. I, § 2. The Guarantee Clause, which is directly relevant to elections for representatives in *state* governments, does not apply directly to Texas's districts for the *federal* House of Representatives. It serves, however, as yet another brick in the constitution's republican edifice. It underscores what should already be apparent: the Texas redistricting is at odds with the Constitution's very core.

Accountability of representatives to the people is the touchstone of republican government. *See Tarrant County v. Ashmore*, 635 S.W.2d 417, 421 (Tex. 1982) ("[A] fundamental principle associated with our republican form of government is that every public officeholder remains in his position at the sufferance and for the benefit of the public, subject to removal from office by edict of the ballot box . . . ."); *accord People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1242 (Colo. 2003) ("A 'fundamental axiom of republican governments' . . . is that there must be 'a dependence on, and a responsibility to, the people, on the part of the representative,

which shall constantly exert an influence upon his acts and opinions, and produce a sympathy between him and his constituents.'") (quoting Joseph Story, *Story's Commentaries on the Constitution* § 300 (1833)).

Permitting a partisan state legislative majority—rather than the people—to select House representatives would fly in the face of the Framers' design. That conclusion is underscored by the Constitution's command that Members of the House be "chosen . . . by the People of the several States." U.S. Const. art. I, § 2, cl. 1; *see also Wesberry v. Sanders*, 376 U.S. 1, 8 (1964) (referring to "the principle of a House of Representatives elected 'by the People,' a principle tenaciously fought for and established at the Constitutional Convention"); *The Federalist* No. 52, at 256 (James Madison) (Terence Ball ed., 2003) ("[I]t is particularly essential that the [House] should have an immediate dependence on, and an intimate sympathy with the people."). *Cf.* U.S. Const. amend. XVII (requiring direct popular election of Senators).[3]

If viewpoint discrimination is the Texas mid-decade redistricting's cardinal sin, its subversion of government accountability is not far behind. This can be seen most clearly in the context of the largely Republican West Texas districts whose voters stubbornly re-elected Democratic incumbents while mostly voting for Republicans in other races. It is no secret that one of the legislature's main goals in redrawing the lines was to put those Democratic incumbents into different districts from most of their existing constituents.

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[3] This choice was entirely conscious; for the first century-and-a-quarter of the nation's existence, the U.S. Senate was in fact chosen by the various state legislatures. U.S. Const. Art. I, § 3, cl. 1. This practice was so prone to partisan abuse and corruption that the Constitution was amended to provide direct election. U.S. Const. amend XVII.

It is understandable that a Republican legislative majority would be impatient with voters in a half-dozen Republican-leaning districts who choose to retain Democratic incumbents. But the decision whether, and when, to end those representatives' ties with their constituents properly belongs to the people. The extraordinary re-redistricting took that decision away from them and gave it to the legislature, a profoundly anti-republican usurpation of power.

The power grab was not surprisingly, and not inaccurately, characterized in the media as anti-Democrat. But among its most prominent victims are the Republicans of West Texas, whom party leaders punished for their wayward votes by denying them the right to elect representatives of their choice. Another state unsuccessfully tried something similar (though less invidious in that its rule was not viewpoint-based) when it adopted congressional term limits.

> Not the least of the incongruities in the position advanced by Arkansas is the proposition, necessary to its case, that it can burden the rights of resident voters in federal elections by reason of the manner in which they earlier had exercised it. If the majority of the voters had been successful in selecting a candidate, they would be penalized from exercising that same right in the future.

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 844 (1995) (Kennedy, J., concurring).

The Colorado Supreme Court understood that the kind of mid-decade tinkering undertaken by Texas and also attempted in Colorado undermines republicanism, even putting partisan motivations to one side:

> The framers knew that to achieve accountability, there must be stability in representation. . . . If the

> districts were to change at the whim of the state legislature, members of Congress could frequently find their current constituents voting in a different district in subsequent elections. In that situation, a congressperson would be torn between effectively representing the current constituents and currying the favor of future constituents.

Salazar, 79 P.3d at 1242. The heads-we-win-tails-you-lose approach—try to beat opponents at the ballot box and then, if that fails, punish uncooperative voters by taking away their chosen representatives—is the antithesis of the republican government guaranteed by the federal and Texas Constitutions.[4]

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[4] Again, the Colorado Supreme Court appreciated the harm done to the people's interests by severing the links between them and their representatives:

> The frequency of redistricting affects the stability of Colorado's congressional districts, and hence, the effectiveness of our state's representation in the United States Congress. When the boundaries of a district are stable, the district's representative or any hopeful contenders can build relationships with the constituents in that district. Furthermore, the constituents within a district can form communities of interest with one another, and these groups can lobby the representative regarding their interests. These relationships improve representation and ultimately, the effectiveness of the district's voice in Congress.

Salazar, 79 P.3d at 1228. This point was also appreciated by the citizens—Republican and Democratic—of the districts that were separated from the representatives who understood their local interests. *See West Texas Opposition*, Austin American-Statesman, Oct. 15, 2003, at A12 (collecting editorial comment from West Texas newspapers); Clay Robison, *Undecided Texas Lawmakers Feel Pressure over New Redistricting Map*, Houston Chronicle, July 13, 2003 ("[T]he veteran statehouse Republican [Bob Hunter of Abilene] found plenty of time to listen to constituents. They were everywhere, and to a person—Republicans, (cont'd)

C. Elections Clause.

States have no inherent authority over federal elections. Their power to hold elections for federal offices arises from the federal Constitution. *See Cook v. Gralike*, 531 U.S. 510, 522 (2001) . A state cannot exercise any powers with respect to federal elections beyond those delegated by the Constitution. *U.S. Term Limits*, 514 U.S. at 805. This Court has made clear that hamstringing a particular group of candidates is not part of the authority delegated to the states.

When a state exercises its plenary police power, federal courts are appropriately reluctant to intercede. Here, considerations of federalism cut the other way. "There can be no doubt, if we are to respect the republican origins of the Nation and preserve its federal character, that there exists a federal right of citizenship, a relationship between the people of the Nation and their National Government, with which the States may not interfere." *Id.* at 845 (Kennedy, J., concurring).

States' power to draw congressional district lines stems from the Elections Clause of Article I, Section 4 of the Constitution, which permits states to regulate the "Times, Places, and Manner" of congressional elections. *See Wesberry*, 376 U.S. at 7–9. Limits on the legitimate use of time, place, or manner regulations are, of course, not unknown to constitutional jurisprudence. In the analogous First Amendment context, the Court has repeatedly ruled that viewpoint-based regulations of speech cannot be defended as mere time, place, or manner regulations. *E.g., Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972); *Carey v. Brown*, 447 U.S. 455 (1980).

(cont'd)
Democrats and independents alike—they didn't want their West Texas congressional district redrawn.").

As Chief Justice Rehnquist and Justice O'Connor noted in their concurrence in *Cook*, 531 U.S. at 531–32, the Election Clause mirrors the First Amendment in forbidding content-based, let alone viewpoint-based, time, place, or manner regulations. *Cf. Tashjian v. Republican Party*, 479 U.S. 208 (1986) (upholding power to set content-neutral procedures for Congressional elections). Or, to use the majority's formulation, electoral mechanisms designed to "place their targets at a political disadvantage" are outside states' Elections Clause authority. *Cook*, 531 U.S. at 525.

The Texas re-redistricting intentionally grants decisive power to citizens who have expressed favored political views. Simultaneously, it makes it as hard as possible for citizens with disfavored views to elect like-minded candidates. A state cannot possibly defend as a time, place or manner regulation an electoral system openly adopted for that viewpoint-based purpose. *See id.* at 523 ("[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.") (internal quotation marks omitted). Sham procedural regulations that purport to set election procedures, but really dictate election results, violate the Elections Clause. Here, there is not even a sham: Texas concedes that the re-redistricting was undertaken for the sole purpose of altering the outcome of future congressional elections.

Nor, if the re-redistricting is allowed to stand, would there seem to be a limiting principle to states' power to interfere with congressional elections. If the Texas legislature can redistrict for no reason other than to install the congressional delegation it prefers, what will stop a state legislature from changing a U.S. representative's district at its whim, rendering the district more or less favorable to that representative based on his or her votes in Congress, his or her responsive-

ness to local party leaders, or any other factor the legislative majority wishes? What could stop a legislature from adjusting the lines two or three or four times a decade? Nothing could be more at odds with the limited role in administering House elections that the Framers intended the state legislatures to exercise. *See U.S. Term Limits*, 514 U.S. at 808 (noting that the Elections Clause was meant to limit state legislatures' influence over the House).

Both the *Vieth* plurality and the District Court in this case suggested one possible limit to congressional redistricting abuses by states: Congress itself. The Elections Clause permits Congress to override almost all of the procedures adopted by the states for electing House members, though of course it does not *require* Congress to do anything. As the *Vieth* plurality pointed out, Congress knows what the states have been up to.

> Recent history, however, attests to Congress's awareness of the sort of districting practices appellants protest, and of its power under Article I, § 4 to control them. Since 1980, no fewer than five bills have been introduced to regulate gerrymandering in congressional districting.

Vieth, 541 U.S. at 276–77 (plurality opinion) (citations omitted). The events underlying this case dramatically confirm "Congress's awareness of abusive districting practices": the re-redistricting was openly orchestrated by the Majority Leader of the (federal) House of Representatives. And his counterpart, the Minority Leader, has discussed with officials in Democrat-controlled states the possibility of copying the Republicans' innovation. *See* Chris Cillizza, *Democrats Eye Remap Payback; Leaders Target Illinois, N.M.*, Roll Call, Feb. 22, 2005. The District Court majority in its first opinion in this case expressed the hope that Congress might step in and forbid mid-decade redistricting altogether to avoid she-

nanigans like those seen in Texas. That hope seems, to put it mildly, somewhat optimistic.

There may well have been no fewer than five bills introduced in the past quarter-century (none since 1990) to regulate gerrymandering in congressional districting, as the *Vieth* plurality noted. None of those bills passed either house of Congress. Given the natural penchant of both major political parties to take maximum advantage of any legislative majority they may enjoy in the federal or state legislatures, there is no reason to expect future anti-gerrymandering bills to fare any better (all five bills cited by the *Vieth* plurality were introduced into a Democratic-majority House and failed to progress). *Vieth* and this case both happen to involve Republican gerrymanders. Of course, Democrats are not averse to similar abuses, as this Court knows from *Cox*.

Following the 2000 census, for example, Maryland's Democratic governor drafted state and federal redistricting plans that were assailed in part as gerrymanders, both on party grounds and for the way in which they punished individual legislators whom the governor considered political enemies. The state redistricting plan was struck down for violating the state constitutional requirement to give "due regard" to the boundaries of political subdivisions. *In re Legislative Districting of the State*, 805 A.2d 292 (Md. 2002). The House of Representatives plan, which was designed to (and did) cause the defeat of Republican Representative Connie Morella, helped to convert the state's delegation from 4–4 to 6–2 in favor of the Democrats but was upheld by the Fourth Circuit. *See Duckworth v. State Admin. Bd. of Election Laws*, 332 F.3d 769 (4th Cir. 2002); Sarah Koenig, *Congressional Districts Fought in Federal Suit*, Baltimore Sun, June 19, 2002, at 1B ("Even many Democrats have been hard-pressed to defend the congressional map's lines, which in places look as if they were drawn by a child experimenting with an Etch-A-Sketch.").

Around the same time, Georgia Democrats adopted the gerrymandered state legislative districts struck down in *Cox*. The party also managed to gain two seats in the state's congressional delegation in an election in which voters statewide rejected Democratic incumbents in races for Governor and U.S. Senator. Democrats eliminated Republican Congressman Bob Barr, a manager of President Clinton's impeachment trial, by putting him in the same district as another Republican incumbent, in spite of the state's having received two additional seats in the House.

Republicans had Georgia on their minds when they gerrymandered Pennsylvania and provoked the *Vieth* litigation. "Democrats rewrote the book when they did Georgia, and we would be stupid not to reciprocate," said Virginia Rep. Thomas M. Davis III, Chairman of the National Republican Congressional Committee. Thomas B. Edsall, *Democrats Hold Edge Over GOP in Redistricting; Gains Still Possible for Republicans*, Washington Post, Dec. 14, 2001, at A55.

Rep. Davis's blunt talk—"we would be stupid not to reciprocate"—is typical. Just as Republicans responded to Democrats' "rewr[iting] the book" in Georgia, Democrats have not only threatened to copy Republicans' Texas playbook in states they control, but have also begun planning to redistrict states that they hope to take control of after the 2006 midterm election. *See* Josh Kurtz, *Remap Revenge in New York?*, Roll Call, March 1, 2005.

> Regardless of the tactics Democrats may eventually choose, what is clear is that redistricting is no longer simply a once-a-decade process but rather part of the ongoing struggle by both parties to make gains in the House.

Chris Cillizza, *Democrats Eye Remap Payback*, *supra*.

In this environment, it would be naive to expect either party to use its control of Congress to stop abuses like the Texas re-redistricting. For much of our history, anti-democratic entrenchment was permitted because redistricting was an irregular and infrequent process in many states. Since this Court's one-person, one-vote decisions required regular post-census redistricting, redistricting has been a "once-a-decade process." Unless the Court acts again now, constant partisan tinkering will become the new norm, with some of the same deleterious consequences as the pre-*Baker* regime. The result would be a far greater likelihood that an ever-widening number of voters of both parties in many states would be denied the chance to affect the outcome of legislative races. Without this Court's intervention, what began as a particularly shameless power-grab in one legislature will metastasize into the national norm.

D. Equal Protection Clause

Burdening the rights of voters who express certain viewpoints, or who have certain political affiliations, violates the Equal Protection Clause as well as the Elections Clause. In *Baker* and its progeny, the Court prohibited apportionments that systematically underweighted the votes of citizens in particular districts. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964) ("[D]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race."). In *Kramer* and *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), the Court barred allocating the franchise on differential grounds. This equal protection jurisprudence culminated in *Bush v. Gore*, 531 U.S. 98 (2000), which stopped a recount because of a lack of uniform standards for counting votes. The principle throughout has been the right of every voter to equal treatment.

In non-electoral contexts as well as electoral contexts, the Equal Protection Clause guarantees that the government will not treat people differently without a legitimate reason. *See Lyng v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Amer.*, 485 U.S. 360, 370 (1988). In a democracy, the fact that citizens have expressed differing political preferences is decidedly not a legitimate reason for treating some worse than others. That, however, was the Texas legislature's sole reason for taking up redistricting when the state already had a legal set of congressional districts. As the state itself has conceded, and as the District Court found, the process would not have been undertaken at all but for partisan advantage, which is a polite way of describing the deliberate prevention of those who have voted "incorrectly" in the past from electing candidates of their choice in the future.

Because that objective is not a legitimate basis for state action, the re-redistricting would fail even rational basis scrutiny. Ensuring the electoral success of one political party has no reasonable relationship to a legitimate governmental end. The state's interest, as distinct from the interest of the individuals who currently occupy its legislature, is in providing free and fair elections, not in guaranteeing a particular result.

Ordinary decennial redistricting, however partisan it may be, serves the nonpartisan state interest of replacing districts that would otherwise violate the "one person, one vote" guarantee. A complex mixture of motives is inevitably at play in this mandatory process, which may make it hard to assign a single dominant cause to the resulting map, or even to the placement of any particular voter in a particular district. This case is different. It is indisputable that the re-redistricting would not have happened at all—there would have been *no* new map of any kind—but for the opportunity it presented for partisan advantage.

Rational-basis review is not particularly stringent, but it does serve an important purpose. "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer v. Evans*, 517 U.S. 620, 633 (1996). Yet that was precisely the state's purpose here: the burdens suffered by those who had previously voted for Democrats were not incidental but were the *raison d'être* of the entire enterprise.

As *Romer* repeated and several of the *Vieth* opinions recognized, it is a longstanding and fundamental principle that state action must be actuated by some neutral, legitimate state interest. Even if partisan considerations are inevitably part of the lawmaking process, as they undoubtedly are in redistricting, they must be accompanied by some other interest that belongs to the state, rather than to officeholders and their parties. *See Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment) ("A determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective."); *id.* at 333 (Stevens, J., dissenting) ("[T]he Equal Protection Clause implements a duty to govern impartially that requires, at the very least, that every decision by the sovereign serve some nonpartisan public purpose."); *id.* at 355, 360 (Breyer, J., dissenting) ("[P]ure politics often helps to secure constitutionally important democratic objectives. But sometimes it does not. Sometimes purely political 'gerrymandering' will fail to advance any plausible democratic objective while simultaneously threatening serious democratic harm. . . . The use of purely political boundary-drawing factors, even where harmful to the members of one party, will often nonetheless find justification in other desirable democratic ends, such as

maintaining relatively stable legislatures in which a minority party retains significant representation."). The fact that so few enactments fall under rational basis review reflects not so much the weakness of the test but the acceptance by politicians of the fundamental principle that laws must be affected with a public interest.

But this is not a rational basis case in any event. Laws that differentially burden the exercise of fundamental rights must pass a more stringent test: they must serve a compelling state interest. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 216–17 & n.15 (1982). Texas has penalized citizens' exercise of their rights of political association and expression, as well as the right to vote. Those rights are undeniably fundamental, as we discuss at greater length in the next section of this brief concerning the First Amendment. This Court has noted that "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively" is "fundamental." *See Ill. State Bd. of Elections*, 440 U.S. at 184 (internal quotation marks omitted). The re-redistricting's proponents repeatedly testified that their action served no interest *other than* preventing voters of a disfavored "political persuasion" from "cast[ing] their votes effectively."

The desire to help one faction and harm another is not even a legitimate state interest, let alone a compelling one. The fact that the legislature chose its victims on the basis of the content of their past expression, burdening the rights of voters in neighborhoods whose residents have tended to vote for a disfavored political party, only exacerbates the problem: viewpoint-based restrictions on speech are highly suspect. *See Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 828–29 (1995). Diluting the voting power of a disfavored class is, moreover, among the most fundamental breaches of democratic doctrine. *See Gray v. Sanders*, 372 U.S. 368, 379–80 (1963) ("The concept of 'we the people' under the Constitution visualizes no preferred

class of voters but equality among those who meet the basic qualifications."); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."); *Bush v. Gore*, 531 U.S. at 104–05 (referring to "the equal weight accorded to each vote and the equal dignity owed to each voter" and holding that states cannot "value one person's vote over that of another").

The re-redistricting violates the Equal Protection Clause in part because of its attack on fundamental rights that are also protected by the First Amendment. But the equal protection claim is not simply a First Amendment claim dressed in different clothes. What Texas has done is contrary to the very nature of equal protection:

> A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.

Romer, 517 U.S. at 633.

II.
The Re-redistricting Violated the First Amendment.

Like the Constitution itself, the First Amendment has an architecture that reflects an inherent, structural, and intentional commitment to representative democracy. The six clauses of the First Amendment form a set of concentric circles with the democratic citizen at the center. The text opens with Establishment Clause protection of private conscience, moves to Free Exercise protection of public displays of conscience, continues with Free Speech protection of individual expression, extends to institutional expression of ideas by guaranteeing a Free Press, goes on to Free Assembly protection of collective action, and culminates in protecting

formal interaction with the government through Petitions for Redress of Grievances. The sequence is not random. The textual rhythm of Madison's First Amendment reprises the life cycle of a democratic idea, moving from the interior recesses of the human spirit to individual expression, public discussion, collective action, and finally direct interaction with government. Madison's vision remains one of our most valuable guides to the kind of democracy the Constitution guarantees.

Electoral politics thus implicate the First Amendment's core purpose. Much of this Court's First Amendment jurisprudence has been devoted to the proposition that government must remain neutral regarding its citizens' ideological expression and association. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Mosley*, 408 U.S. at 95. The political acts of voting and running for office are quintessential exercises of free speech and free association. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780 (1983) (recognizing right to run for office as act of political association between candidate and supporters); *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992) (noting regulation of voting burdens First Amendment rights but holding that standard of review varies with circumstances).

The neutrality principle has particular force when it comes to elections. Elections are a formal, structured marketplace. Each candidate seeks to persuade voters that his or her ideas (and the ideas of the party to which the candidate belongs) should be enacted into law. Unless government remains neutral in administering the contest, the electoral competition cannot operate fairly. It would be self-defeating to expend substantial judicial resources defending a neutral marketplace of ideas on sidewalks and in parks, only to allow the government to rig the outcome of elections that are the

culmination and object of the First Amendment's textual protections. If the Constitution forbids denying governmental employment because of an individual's political affiliation or belief, *see Elrod v. Burns*, 427 U.S. 347 (1976), and forbids conditioning government contracts on support for political incumbents, *see O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996), it cannot countenance burdening the right to vote on the same forbidden bases.

After canvassing some of these same precedents, Justice Kennedy concluded in *Vieth*:

> First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights.

Vieth, 541 U.S. at 314 (Kennedy, J., concurring). Texas does not deny the purpose of the re-redistricting. The question, then, is whether there are judicially manageable standards for gauging the re-redistricting's effect. *See id.* at 315 ("Of course, all this depends first on courts' having available a manageable standard by which to measure the effect of the apportionment and so to conclude that the State did impose a burden or restriction on the rights of a party's voters."). It is to that question that we now turn.

III.
There Are Judicially Manageable Standards for Evaluating the Effect of the Re-redistricting.

Even if one believes (as we do not) that ordinary post-census redistricting is not amenable to manageable judicial standards, this was no ordinary redistricting. The fact that the

proponents of the legislation admitted, and the lower court found, that there was no motivation for this action other than partisan advantage sets this case apart.[5]

Unlike in *Vieth*, there is no question here of "predominant" causes. The entire process of re-redistricting was undertaken for one reason and one reason only: partisan advantage. Burdening the rights of disfavored voters, and the derivative rights of their chosen representatives, was the whole purpose, motivation, and intention for the legislature even to convene. Even if the process itself, once begun, was molded in part by considerations like the equipopulation requirement, the District Court need not have tried to discern what was the "predominant" force in the process. It needed only determine, as it already has, the sole purpose for the process's having occurred at all.

The re-redistricting was a river with a Republican sea as its only objective. The one-person, one-vote principle, incumbent protection, Voting Rights Act compliance, and the like may have formed the river's banks and shaped the precise path it took, but they affected the final destination not one whit. As the legislature and its allies in Austin and Washington vividly demonstrated, the only barriers the river would respect were those the law imposed and courts were willing to enforce. It is clear that nothing—not senate rules and traditions, not compunction over the use of national security agencies to harass state legislators, not the overwhelming opposition of citizens at public hearings—was going to stop

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[5] We do not disagree with the argument of some plaintiffs and Appellants that the legislature intentionally acted on the basis of race. We simply note that legislators testified, and the District Court found, that partisanship was the state's sole objective. To the extent that race was a factor, the legislature's reliance on a suspect classification can hardly ameliorate the constitutional injury done by its otherwise single-minded pursuit of partisan advantage.

the re-redistricting's architects of the from pursuing their objective of pure partisan advantage. *See* Office of the Inspector General, U.S. Dep't of Justice, *An Investigation of the Department of Justice's Actions in Connection with the Search for Absent Texas Legislators*, at 4–6 (Aug. 12, 2003), available at http://www.usdoj.gov/oig/special/03-08a/final.pdf; Statement of Hon. Kenneth M. Mead, Inspector General, U.S. Dep't of Tranp., *Federal Aviation Administration Efforts to Locate Aircraft N711RD* (July 15, 2003), available at http://www.oig.dot.gov/show_pdf.php?id=1127; Office of Inspector General, U.S. Dep't of Homeland Security, *Report of Investigation IN03–OIG–0662–S*, at 1, available at http://www.dhs.gov/interweb/assetlibrary/DHS_OIG_Investigation_Texas.pdf.

These considerations do not directly have to do with assessing the re-redistricting's effects. But they are critical to understanding how those effects should be measured. In a mandatory decennial redistricting involving a complex mixture of motivations, one may find it difficult to judge how much partisan effect is "too much." Even conceding for the sake of argument that there are no judicially manageable standards for making that judgment, however, no such judgment is required in this case. Although vote dilution is inevitable under any districting scheme, and some voters will consistently be outvoted, "[i]t is one thing for a phenomenon to exist by necessity, and quite another for someone to distribute or redistribute it selectively." Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & Pol'y Rev. 301, 313 (1991). Intent converts an unfortunate effect into an actionable injury. *See Washington v. Davis*, 426 U.S. 229 (1976).

It is undeniable, under any standard of measurement, that the re-redistricting accomplished the (impermissible) intention of its authors. The targeted West Texas Democrats were

purged from the House, and the Texas delegation achieved the partisan makeup that had been predicted by both supporters and opponents of the re-redistricting. A state may not burden its citizens' rights at all without a legitimate purpose. When the state acts purely for an illegitimate purpose, any effect on protected rights is "too much." The rights of hundreds of thousands, if not millions, of voters have been impaired in precisely the fashion intended; under the circumstances, it cannot credibly be contended that the Court lacks an adequate metric for determining whether there has been an impermissible effect. One need not know exactly how many people will end up in the hospital to be certain that it is wrong to put arsenic in the soup.

In an ordinary redistricting, a specific group of voters may suffer a relative inability to elect candidates of choice, but it is a complex task to draw a clear causal link between the impairment of those particular individuals' rights and legislative partisanship. They might have been "packed" or "cracked" because they were Democrats, but they may also find themselves in their current districts because the incumbent in the neighboring county needed a safe district or because the line-drawers had to ensure non-retrogression under Section 5 of the Voting Rights Act.

There is no difficulty, however, in identifying the *conditio sine qua non* for the inability of West Texas Republicans to re-elect their chosen representatives in 2004, nor for the impairment of the rights of voters elsewhere in the state. No district line would have moved an inch to protect an incumbent. No line would have moved to adhere to a city or county boundary. No line would have moved to meet the Voting Rights Act's requirements. *Nothing* would have happened to any Texas voter had the legislature and its cronies not set the process in motion for the sole purpose of discriminating against voters with disfavored viewpoints.

This case is more like *Cook v. Gralike* than it is like *Vieth*. In *Cook*, the Court struck down a law requiring the ballot to identify incumbent members of the House who were defying a state-imposed limit on the number of terms they ought to serve. The Court could have speculated about how many votes would actually be affected by the ballot notice. It could have guessed how often, if ever, an incumbent would have been defeated because of the forbidden words on the ballot. But the Court did not have to do either of those things. The state had no legitimate reason, and no authority under the Elections Clause, to put those words on the ballot in the first place. Therefore, there was no need to measure the words' effect with any precision: any effect was "too much." Just so here. Texas has acted beyond the scope of the authority granted to it by the federal Constitution, and for good measure it has also transgressed individual rights protected under the First Amendment and the Equal Protection Clause. As in *Cook*, the state's actions serve no permissible purpose. As in *Cook*, therefore, the judiciary is competent and indeed required to overturn those actions.

CONCLUSION

The District Court's judgment should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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Nos. 05-204, 05-254, 05-276 and 05-439

IN THE

Supreme Court of the United States

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, et al.,
Appellants,

&

TRAVIS COUNTY, TEXAS, et al.,
Appellants,

&

EDDIE JACKSON, et al.,
Appellants,

&

GI FORUM OF TEXAS, et al.,
Appellants,

v.

RICK PERRY, GOVERNOR OF TEXAS, et al.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Texas

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BRIEF FOR THE CENTER FOR AMERICAN PROGRESS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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BRIEF OF THE CENTER FOR AMERICAN PROGRESS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

The Center for American Progress respectfully submits this brief *amicus curiae* in support of the appellants in these cases.[1]

INTEREST OF *AMICUS CURIAE*

Founded in 2003, the Center for American Progress ("the Center") is a nonpartisan research and educational institute dedicated to promoting a strong, just, and free America that ensures opportunity for all. The Center works to find progressive and pragmatic solutions to significant problems facing our nation in order to foster a government "of the people, by the people, and for the people." In just over two years, the Center has held over 250 events featuring former presidents, Cabinet secretaries, and federal, state, and local elected officials. The Center's policy experts have authored more than 200 original reports on a wide array of public policy issues, including education, health care, tax policy, civil liberties, and international affairs, which have been cited by the media more than 1,000 times. The Center's research and policy proposals have been circulated widely on Capitol Hill and in state legislatures across the nation.

The Center has a strong commitment to good government and protecting the right of the American people to participate meaningfully in our democratic system. The Center has hosted expert policy discussions and published research on voting systems, election administration, redistricting, and expanding access to the franchise. The Center has filed *amicus curiae* briefs before this Court and other courts in cases, involving significant issues of public policy.

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[1] Letters of consent from all parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Texas Legislature's unprecedented mid-decade partisan gerrymander burdens recognized expressive rights, and this Court should apply heightened First Amendment scrutiny to invalidate the plan. Although the Court has noted that the redistricting process is always "root-and-branch a matter of politics," *Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004), this case raises unique concerns about the role of partisan politics in redistricting.

Redistricting almost always involves the classification of voters based upon the exercise of core political expression. As this Court has recognized, legislators who control the redistricting process draw district lines with an eye toward achieving specific political outcomes. To accomplish their aims, such legislators must examine and assign voters to districts using prior voting patterns and registration data. Both voting and affiliating with a political party constitute exercises of political expression that are plainly protected by the First Amendment. At its core, gerrymandering thus impinges upon recognized First Amendment rights by benefiting some individuals and penalizing others based on how those individuals have exercised their First Amendment rights.

In the past, this Court has evaluated election laws and regulations that burden voters' First Amendment rights under a flexible standard, subjecting regulations that impose significant burdens to heightened scrutiny. Although this Court has not applied this standard in the gerrymandering context, it has also never confronted a case like this one. This case involves a legislative effort to replace a *valid* court-drawn plan for no reason other than naked partisan politics; indeed, there is no dispute that the "single-minded purpose" of this plan was "to gain partisan advantage." Jurisdictional Statement of *Jackson* Pls. App. at 89a. Moreover, in replacing one valid map with another, the Texas Legislature failed to

take into account new population data of any kind, despite overwhelming evidence of important changes in the State's population and demographics. These facts call for the application of heightened scrutiny under this Court's flexible standard for assessing the permissibility of election laws and regulations that impact voters' First Amendment rights.

Under that flexible standard, election laws subjected to heightened scrutiny can only be sustained if they serve an important state interest. Traditional redistricting has always involved the important state interest of bringing district lines into compliance with the Constitution and federal law. But that interest is not at stake when, as here, a valid map is already in place. The burden therefore lies with Texas to identify an alternative interest important enough to justify its discrimination against certain of its citizens based on prior exercises of their fundamental rights. Texas cannot satisfy that burden in this case.

The Center agrees with the *Jackson* appellants that the 2003 Plan is unconnected to any legitimate state interests, and therefore fails even rational-basis review. The Center writes separately, however, to urge the Court to apply heightened scrutiny to the 2003 Plan. In any other context, government classifications based so patently on protected expressive and associational rights would be subject to strict judicial scrutiny. The fact that this case involves redistricting, rather than some other government action, should not render those very same classifications subject to rational-basis review, the default standard applicable to garden-variety economic regulations.

As this Court has recognized, partisan gerrymandering has been part of the American political landscape for several centuries. In recent years, however, both major political parties – aided by constantly improving computer technology – have engaged in increasingly aggressive and sophisticated partisan gerrymanders. The application of heightened scru-

tiny is appropriate in this case to ensure that unusually naked and pernicious *mid-decade* partisan gerrymandering does not become part and parcel of both parties' efforts to entrench their positions in Congress.

ARGUMENT

All election regulations burdening expressive rights are subject to review under this Court's standards. Consistent with basic due process protections against arbitrary state action, even incidental burdens are subject to rational-basis scrutiny. The Center agrees with the *Jackson* appellants that the Texas Plan cannot even survive this level of scrutiny because the 2003 Plan is "'inexplicable by anything but animus toward the class it affects.'" Jurisdictional Statement of *Jackson* Pls. at 14 (quoting *Romer v. Evans*, 517 U.S. 620, 632 (1996)). If the Court agrees, it need not consider whether to apply heightened scrutiny to the 2003 Plan.

Should the Court reach that question, however, the Center submits that heightened scrutiny *is* appropriate in the unusual and limited context of this type of mid-decade redistricting. The First and Fourteenth Amendments prohibit the government from inflicting injury on citizens for no reason other than political outlook, and heightened scrutiny ensures that the Court can distinguish justifiable redistricting classifications from naked or pretextual partisan gamesmanship. Indeed, this Court has already adopted a flexible standard for assessing the permissibility of election-related regulations, and that standard is easily and properly applied to this partisan gerrymander. Applying heightened scrutiny to the 2003 Plan requires its invalidation. The Court should thus invalidate the 2003 Plan and reinstate the court-drawn 2001 map.

I. THE TEXAS REDISTRICTING PLAN PLACES UNPRECEDENTED BURDENS ON EXPRESSIVE RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS, WARRANTING HEIGHTENED SCRUTINY

The freedom to express one's viewpoints at the ballot-box lies at the core of our democratic system of government. Indeed, this Court has described the "political franchise of voting" as "a fundamental political right, because [it is] preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The expressive quality of voting operates in at least two distinct dimensions. First, citizens express their political choices in the voting booth by marking and casting their ballots at election time. *Cf. Burdick v. Takushi*, 504 U.S. 428, 437-39 (1992) (recognizing limited expressive function of voting); *Ill. State Bd. of Elec. v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (noting that ballot access restrictions impair "the voters' ability to express their political preferences"). Second, citizens express their political associations when they vote for candidates of particular parties, as well as when they engage in election-related activities such as registration or membership. *See, e.g., NAACP v. Button*, 371 U.S. 415, 430 (1963) (recognizing that affiliation with political parties represents an exercise of associational rights under the First Amendment).

Viewpoint- and content-based regulation of such core political expression is normally subject to the strongest level of scrutiny under the First Amendment. Under strict-scrutiny review, a State must advance a "compelling" government interest in such regulations, and it must then show that the regulation in question is narrowly tailored to advance that interest. *E.g., Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101-02 (1972) (striking down an ordinance regulating picketing on all but labor-dispute-related subjects).

But at the same time, elections themselves are not "'Hyde Parks open to every would-be pamphleteer and politician.'" *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 n.9 (1983) (quoting *U.S. Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 130 n.6 (1981)). Rather, the electoral process operates as a limited public forum that is subject to regulations which "channel" expressive activity in a manner "compatible with the intended uses" of the forum. *See Burdick*, 504 U.S. at 438 (approving "politically neutral regulations that have the effect of channeling expressive activity at the polls"); *cf. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 819 (1985) (Blackmun, J., dissenting) ("In a limited public forum . . . the need to confine expressive activity on the property to that which is compatible with the intended uses of the property will be a compelling interest that may justify distinctions made between speakers."). The States and the Federal Government accordingly enjoy the necessary flexibility to ensure that elections are "fair and honest and [that] some sort of order, rather than chaos, [accompanies] the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). The mere fact that "[e]lection laws will invariably impose some burden upon individual voters" does not mean that all such laws are categorically or even presumptively invalid. *Burdick*, 504 U.S. at 433; *see also Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

This Court has instead adopted a "flexible standard" to evaluate election-related laws that impact expressive rights. "A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting

Anderson, 460 U.S. at 789). "Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Id.* As in other limited-forum contexts, the burden on the State to defend its election regulations increases as the burdens on the voter are more severe. *See id.* (citing *Norman v. Reed*, 502 U.S. 279, 289 (1992)). When an election regulation "imposes only 'reasonable, nondiscriminatory restrictions' upon First and Fourteenth Amendment rights of voters," however, "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting and citing *Anderson*, U.S. 460 at 788, 788-89 & n.9). Even then, of course, the State must identify a cognizable interest served by the regulation. But when severe burdens are placed on voters' First and Fourteenth Amendment rights, the law in question must be "narrowly drawn to advance a state interest of compelling importance." *Id.* (quotation omitted).

The Court has never applied this flexible standard to a case involving partisan gerrymandering. Instead, in its limited political gerrymandering jurisprudence, the Court has relied upon equal-protection analysis. *See generally Davis v. Bandemer*, 478 U.S. 109 (1986). Moreover, a plurality of the Court recently announced that it was prepared to abandon the search for "judicially discernible and manageable standards by which political gerrymander cases are to be decided" and to declare such cases to be nonjusticiable. *Vieth*, 541 U.S. at 278 (quoting *Davis*, 478 U.S. at 123 (plurality opinion)). Casting the pivotal fifth vote in *Vieth*, however, Justice Kennedy suggested that the continued search for manageable standards in political gerrymandering cases might find fertile ground in the First Amendment. *See id.* at 314 (Kennedy, J., concurring in the judgment). Justice Kennedy explained that "[t]he First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering. After all,

these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Id.* Justice Kennedy suggested "that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights," *id.*, and that heightened scrutiny (specifically, strict scrutiny) would apply under such circumstances.

The flexible standard this Court has adopted in evaluating the First Amendment burdens created by election regulations in other contexts is well-suited to implement Justice Kennedy's approach and thus to evaluate the 2003 Plan in this case. The standard was designed to accommodate the reality that States must be permitted some discretion in conducting elections. Those cases have focused on a State's interest in ensuring orderly elections that are fair and honest. The redistricting context is analogous: here States must be given some room to serve valid interests, such as satisfaction of the one-person, one-vote requirement and Voting Rights Act obligations, as well as traditionally recognized districting interests. At the same time, the flexible-standard test recognizes that States do not always regulate in a valid way. In cases involving pronounced or obvious burdens on expressive rights, closer scrutiny must be brought to bear to determine whether the justifications offered by the State are sufficiently important and sufficiently advanced by the state action to justify those burdens.

The application of this standard does not call into question the permissibility of the vast majority of Congressional redistricting plans. The reason is that in the modern era, legislatures have undertaken redistricting efforts when valid district lines do not exist and where new lines therefore must be drawn to bring a map into compliance with controlling law. Although politics and partisanship are all but inherent